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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Erica Alvarado,

9 Plaintiff,

10 vs.

11 Northwest Fire District,

12 Defendant.
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No. CIV 19-198-TUC-CKJ

ORDER

14 Pending before the Court is the Motion for Leave to Take Videotaped Trial
15 Deposition fo John Beck (Doc. 105) filed by Defendant Northwest Fire District ("NFD").
16 A response (Doc. 107) and a reply (Doc. 108) have been filed.

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18 *Fed.R.Civ.P. 32(a)(4)*

19 The applicable rules provides that a deposition of a witness may be used "for any
20 purpose" at trial if he or she "is more than 100 miles from the place of hearing or trial or is
21 outside the United States, unless it appears that the witness's absence was procured by the
22 party offering the deposition" or "exceptional circumstances make it desirable, in the interest
23 of justice and with due regard to the importance of live testimony in open court, to permit the
24 deposition to be used." Fed.R.Civ.P. 32(a)(4)(B) and (E).

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26 *Fed.R.Civ.P. 32(a)(4)(B) – Distance*

27 In this case, witness John Beck, Ph.D. ("Dr. Beck") will be more than 100 miles from
28 the place of the trial and it does not appear that Dr. Beck's absence was procured by NFD.

1 Indeed, Dr. Beck was apparently available for the first two scheduled trial dates. Dr. Beck's
2 unavailability only arose upon the need to reschedule the trial date because of the Court's
3 scheduling conflict.

4 The Court finds the use of deposition testimony under Fed.R.Civ.P. 32(a)(4)(B) is
5 appropriate. However, because Dr. Beck has been not deposed, NFD seeks to now conduct
6 a deposition of Dr. Beck although the discovery deadline has passed. Once a district court
7 has issued a Rule 16 scheduling order setting deadlines, it may be "modified only for good
8 cause and with the judge's consent." Fed.R.Civ.P. 16(b)(4). Further, an extension of a
9 deadline sought after its expiration requires a showing of "excusable neglect," not merely
10 "good cause." See Fed.R.Civ.P. 6(b)(1)(B); see also *Mireles v. Paragon Sys., Inc.*, No.
11 13-CV-122-L (BGS), 2014 WL 575713, at *2 (S.D. Cal. Feb. 11, 2014) ("a party moving to
12 amend a pleading after a scheduling order deadline has passed must support the motion by
13 demonstrating both excusable neglect and good cause"), *citation omitted*; *Almaraz v. City of*
14 *Mesa*, No. CV-10-1348-PHX-FJM, 2011 WL 1661535, at *1 (D. Ariz. May 3, 2011)
15 (applying excusable neglect standard to motion to reopen scheduling order deadline);
16 *Hernandez v. Maricopa Cty.*, No. CV-07-272-PHX-JAT, 2009 WL 77647, at *1 (D. Ariz.
17 Jan. 12, 2009) (explaining that "excusable neglect is the standard that must be met by the
18 parties to receive an extension of an expired deadline").

19 There are at least four factors in determining whether neglect is excusable: (i) the
20 danger of prejudice to the opposing party; (ii) the length of the delay and its potential impact
21 on the proceedings; (iii) the reason for the delay; and (iv) whether the movant acted in good
22 faith. See *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223-24 (9th Cir. 2000), *citing*
23 *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 395 (1993). The
24 determination of whether neglect is excusable is ultimately an equitable one, taking into
25 account all relevant circumstances surrounding the party's omission. See *Pioneer*, 507 U.S.
26 at 395. This equitable determination is left to the discretion of the district court. See *Pincay*
27 *v. Andrews*, 389 F.3d 853, 860 (9th Cir. 2004).

1 The expert disclosure deadline in this case was July 6, 2020. While allowing the
2 deposition would result in a deposition over two years after the deadline, it appears the
3 granting of the request would not delay the scheduled trial date. In other words, although the
4 length of the delay is significant, the potential impact on the scheduling of the proceedings
5 is non-existent. Additionally, the Court finds no basis to conclude NFD has acted in bad
6 faith.

7 As to the danger of prejudice to the opposing party, Alvarado asserts she "should not
8 be prejudiced by Defendant's decisions to forego a deposition of Dr. Beck and to agree a trial
9 date at a time when he is scheduled to be on vacation." Opposition (Doc. 107, p. 2).
10 However, Alvarado does not state what prejudice she will suffer a deposition is allowed.
11 Conversely, NFD asserts it will be unduly prejudiced if a deposition is not permitted because
12 Dr. Beck's expected trial testimony is relevant and essential to the defenses at trial. *See*
13 Motion (Doc. 105, pp. 5-7).

14 Significant to the Court is the reason for the delay. The trial date was twice continued
15 because of court-related issues, as opposed to a request from the parties. The trial was
16 originally set for February 28, 2022, but continued to April 18, 2022, due to insufficient
17 courtrooms which accommodate COVID-19 protocols available on the scheduled trial date.
18 The trial was again continued to May 9, 2022 to accommodate the Court's scheduling
19 conflicts. The Court finds it reasonable that the NFD agreed to the trial date in these
20 circumstances. Moreover, although NFD could have chosen to depose Dr. Beck at an earlier
21 time, it was reasonable for NFD to previously expect to present the live testimony of Dr.
22 Beck at trial.

23 In light of these factors, the Court in its discretion finds it appropriate to permit the
24 deposition of Dr. Beck. *See e.g., Draper v. Rosario*, 836 F.3d 1072, 1081 (9th Cir. 2016) (it
25 is within the court's discretion to authorize a deposition)
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1 *Fed.R.Civ.P. 32(a)(4)(E) – Exceptional Circumstances*

2 As previously stated, the applicable rules provides:

3 (4) *Unavailable Witness*. A party may use for any purpose the deposition of a
4 witness, whether or not a party, if the court finds:

5 * * * *

6 (E) on motion and notice, that exceptional circumstances make it desirable—in
7 the interest of justice and with due regard to the importance of live testimony
8 in open court—to permit the deposition to be used.

9 Fed.R.Civ.P. 32(a)(4)(E). The weight of authority suggests the "exceptional circumstances"
10 requirement of Fed.R.Civ.P. 32(a)(4)(E) is a stringent standard. *Forbes v. Cty. of Orange*,
11 633 F. App'x 417, 418 (9th Cir. 2016) ("The district court permissibly concluded that Forbes'
12 counsel failed to do as much as he should have done to ensure Gonzales' attendance at trial.
13 . . The inability to secure Gonzales' live testimony at trial cannot be attributed to 'exceptional
14 circumstances.'"); *McDowell v. Blankenship*, 759 F.3d 847, 851 (8th Cir. 2014) ("We agree
15 Rule 32(a)(4)(E) permits deposition testimony where, in the district court's judgment, live
16 testimony from the deponent is impossible or highly impracticable and 'the interest[s] of
17 justice,' 'with due regard to the importance of live testimony in open court,' counsel in favor
18 of admissibility."); *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 963-64 (10th Cir.
19 1993) (finding that a physician's refusal to appear to testify at trial is not an exceptional
20 circumstance justifying substitution of a deposition transcript: absent a reason why the
21 witness cannot appear, serious prejudice alone cannot justify admission of the deposition
22 testimony); *Allgeier v. United States*, 909 F.2d 869, 876 (6th Cir. 1990) (noting that the
23 circumstances of a witness' absence are exceptional when akin to the witness being
24 "unavailable or unable to testify because he is dead; at a great distance; aged, ill, infirm, or
25 imprisoned; or unprocurable through a subpoena.").

26 Other procedural and evidentiary rules also suggest that the standard poses a high bar.
27 Fed.R.Evid. 804(a)(2), for example, specifies that a witness is "unavailable" for hearsay
28 purposes if he refuses to testify despite a court order to do so. Fed.R.Civ.P. 43(a) requires
a showing of compelling circumstances and appropriate safeguards to authorize "testimony

1 in open court by contemporaneous transmission from a different location." "To provide
2 testimony that is not even contemporaneous - like publishing a deposition - necessarily
3 requires the movant to show something beyond 'good cause in compelling circumstances,'
4 which Rule 32(a)(4) describes as 'exceptional circumstances.'" *U.S. ex rel. Lutz v. Berkeley*
5 *Heartlab, Inc.*, No. CV 9:14-230-RMG, 2017 WL 6015157, at *2 (D.S.C. Dec. 1, 2017).

6 The Court finds exceptional circumstances are present in this case to allow the
7 deposition pursuant to Fed.R.Civ.P. 32(a)(4)(E). Not only is the doctor's absence
8 significantly caused by the actions of the Court, but Dr. Beck will be out of the country on
9 the trial date and NFD has provided supporting facts as to why the doctor is not available.
10 *Compare Waller v. Mann*, No. C17-1626RSL, 2021 WL 2531008, at *2 (W.D. Wash. June
11 21, 2021) (deposition not permitted where, among other factors, witness was within a
12 reasonable distance of the courthouse and supporting facts as to why witness was unavailable
13 were not provided).

14 Accordingly, IT IS ORDERED:

15 1. The Motion for Leave to Take Videotaped Trial Deposition fo John Beck (Doc.
16 105) is GRANTED.

17 2. NFD may take the videotaped trial deposition of John Beck, Ph.D. in person
18 or over Zoom by April 25, 2022.

19 DATED this 5th day of April, 2022.

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22 Cindy K. Jorgenson
23 United States District Judge
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